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CHARLES DIMRY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHARLES DIMRY, Plaintiff, vs. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; THE NFL PLAYER SUPPLEMENTAL DISABILITY PLAN; RETIREMENT BOARD, AS ADMINISTRATOR OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, and DOES 1-10, inclusive, Defendants.	Case No. 16-cv-1413 JD **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** **DATE: May 17, 2018** **TIME: 10:00 A.M.** **JUDGE: HON. JAMES DONATO** **COURTROOM: 11 – 19TH FLOOR**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on May 17, 2018, at 10:00 A.M. or as soon thereafter as counsel may be heard, at the U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, in Courtroom 11, 19th Floor, before the Honorable James Donato, Plaintiff Charles Dimry will, and hereby does, move the Court for an Order granting Plaintiff attorneys' fees and litigation expenses.

This motion is based on this Notice of Motion and Motion for Attorneys' Fees and Costs; the following Memorandum of Points and Authorities in support thereof; the accompanying Declarations

of Terrence J. Coleman, Michael J. Quirk, Lee Harris, and Daniel Feinberg, and exhibits thereto; the pleadings and other documents in the Court's file in this matter; oral argument; and such other matters as may be presented to the Court at the hearing.

Dated: April 10, 2018

PILLSBURY & COLEMAN, LLP

By: /s/ *Michael J. Quirk*
Terrence J. Coleman
Michael J. Quirk
Attorneys for Plaintiff,
CHARLES DIMRY

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I. INTRODUCTION

Plaintiff Charles Dimry ("Plaintiff") brings the present motion for an award of attorneys' fees and litigation expenses pursuant to N.D. Cal. Civil L.R. 54-5 and the fee-shifting provision under section 502(g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132(g). Plaintiff filed this action against Defendants alleging the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan") improperly denied him total and permanent disability benefits under the Plan and ERISA. On March 12, 2018, this Court granted Plaintiff's motion for judgment on his benefit claim, ruled that "the Board's denial of benefits to Dimry was an abuse of discretion," and remanded Plaintiff's claim back to the Board for re-evaluation. Dkt. No. 80 at 7.

ERISA section 502(g) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. §1132(g). In practice, "[a]s a general rule, ERISA . . . plaintiffs should be entitled to reasonable attorneys' fees 'if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit.'" *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587, 589 (9th Cir. 1984) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 443 (1983)); *see also Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2158 (2010) ("a fees claimant must show 'some degree of success on the merits'" in order to warrant attorneys' fees). A prevailing ERISA plan participant such as Plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Smith,* 746 F.2d at 589.

Plaintiff is the prevailing party in this action on more than "some degree of success on the merits." *Hardt*, 130 S.Ct. at 2158. This Court found that in bringing his lawsuit, Plaintiff showed the NFL paid its medical consultant an amount that was "substantial and exceeds the amounts found to be of concern . . ." Dkt. No. 80 at 6. In granting Plaintiff's motion for judgment, this Court determined that Defendants abused their discretion when "the Board denied benefits based upon an unreasonable bias in favor of Plan-selected physicians" and decided Plaintiff's claim "by mere default to a Plan-selected physician." *Id.* at 6-7. Defendants' decision to terminate and deny Plaintiff his benefits constituted multiple breaches of its fiduciary duties to Plaintiff, given that the Supreme Court has stated that ERISA fiduciaries are required to adhere to "higher than marketplace quality standards on

insurers" and "discharge their duties" in respect to discretionary claims processing "solely in the interests" of their claimants. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008) (citing 29 U.S.C. §1104(a)(1)).

Under ERISA, attorneys' fees are determined by a lodestar analysis, multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983); *D'Emanuele v. Montgomery Ward & Co., Inc*., 904 F.2d 1379, 1383 (9th Cir. 1990). An underlying purpose of ERISA is to protect the interests of participants in employee benefit plans, and an important aspect of this protection is to afford access to the courts through an award of attorneys' fees and costs to prevailing plaintiffs such as Plaintiff. *Smith, supra,* 746 F.2d at 589-90. As such, our courts emphasize that parties entitled to fees under ERISA "should recover a fully compensatory fee" encompassing "all hours reasonably expended on the litigation." *Hensley, supra,* 461 U.S. at 435.

Plaintiff achieved total success on his cause of action under ERISA § 502(a)(1)(B)—the Court entered judgment in his favor. He does not seek an exorbitant award. Instead, he merely seeks the reasonable fees and litigation expenses to which he is entitled, and which will ensure that his rights—and the rights of others—are not eviscerated by the breaches of fiduciary duty, signs of bias, and abuses of discretion demonstrated by Defendants in this case, in keeping with the fundamental purposes of ERISA. To find otherwise would reward Defendants and other insurers that wrongfully deny benefits and refuse to fulfill their duties as ERISA fiduciaries. As set forth below, Plaintiff's requested award of **$279,370.00** in fees and **$2,635.62** in litigation expenses through April 9, 2018 (excluding items listed in Plaintiff's bill of costs, Dkt. No. 85) is supported by detailed contemporaneous billing records submitted for the Court's consideration, and is entirely reasonable in relation to the work involved in this litigation, the results obtained, and the skill and experience of his counsel. Additional fees and expenses incurred from April 10, 2018 to the hearing date of this Motion will be provided with Plaintiff's reply papers.

For the reasons asserted above, Plaintiff requests that Defendants be required to pay the requested attorneys' fees and costs within one week of the Court's filing of its Order on this Motion.

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II. PROCEDURAL BACKGROUND

Plaintiff filed this case following an unsuccessful appeal of Defendants' wrongful denial of his "Total and Permanent" NFL disability benefits. Having exhausted his remedies as required by ERISA, on March 23, 2016, Plaintiff filed his complaint alleging (1) a statutory cause of action under ERISA § 502(a)(1)(B) for his T&P disability benefits, (2) a statutory cause of action under ERISA § 502(a)(3) for equitable relief for breach of fiduciary duty, and (3) a claim for statutory penalties for failure to produce documents. Dkt. No. 1. While Plaintiff's decision to file suit was justified by the Court's recent entry of judgment, *see* Dkt. No. 80, the fact-intensive nature of briefing the case's merits as well as Defendants' litigation strategy required Plaintiff's counsel to devote hundreds of hours to this case.

On April 18, 2016, Defendants filed their first motion to dismiss Plaintiff's equitable relief claim. Dkt. No. 13. The parties briefed the applicable issues and the Court heard oral argument from the parties on June 8, 2016. On June 14, 2016, the Court dismissed Plaintiff's equitable relief claim but granted him leave to amend. Dkt. No. 33. Plaintiff revised his allegations and filed his First Amended Complaint on July 6, 2016. In response, Defendants filed a second motion to dismiss. Dkt. No. 39. The parties briefed their respective positions and appeared for a second oral argument. Dkt. No. 50. On October 12, 2016, the Court granted Defendants' second motion to dismiss.

Plaintiff's counsel spent substantial time preparing for mediation with Judge Beeler. *See* Dkt. No. 54. Following mediation, the parties briefed their respective arguments via cross-motions for judgment. Dkt. Nos. 59, 63, 69-70. In addition to briefing the merits of the case, Defendants filed a motion to strike that required additional time to respond to. Dkt. Nos. 68, 73. The parties spent additional time negotiating a stipulation to clarify and narrow the scope of the pleadings. *See* Dkt. Nos. 74, 76-77.

After reviewing the administrative record and the briefing on the cross-motions for judgment, on March 12, 2018, the Court granted Plaintiff's motion for judgment on his claim for LTD benefits. Dkt. No. 80. The Court determined that "the Board's denial of benefits to Dimry was an abuse of discretion," and remanded Plaintiff's claim back to the Board for re-evaluation. *Id.* at 7-8. It further noted that the Retirement Board gave "no indication that it discussed or considered any of the medical reports Dimry submitted," and that "no explanation is given for the Board's apparent decision to

disregard the findings and opinions of Dimry's treatment providers." *Id.* at 3. The Court characterized the Retirement Board's conduct as "questionable because it is hardly a self-evident proposition that Plan-selected physicians are always more neutral and reliable than a claimant's treating physicians, particularly when an inference of financial conflict arises." *Id.* at 7.

The Court entered judgment in favor of Plaintiff on March 13, 2018. Dkt. No. 81. After attempting to meet and confer with Defendant's counsel pursuant to Local Rule 54-5, Plaintiff filed this motion. Quirk Decl., ¶¶10-14, Exhs. A-C.

III. PLAINTIFF IS THE PREVAILING PARTY AND IS ENTITLED TO FEES

A. Plaintiff Is Entitled to Reasonable Attorneys' Fees and Costs As the Prevailing Party Because No Special Circumstances Would Render An Award Unjust

Section 502(g)(1) of ERISA provides this Court statutory authority to award attorneys' fees. 29 U.S.C. § 1132(g)(1). The Supreme Court has held that a fee claimant can be awarded attorneys' fees merely by showing "'some degree of success on the merits.'" *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2158 (2010). Moreover, under controlling Ninth Circuit authority, a prevailing plan participant such as Plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984); *see also Boston Mut. Ins. v. Murphree*, 242 F.3d 899, 904 (9th Cir. 2001) ("We ordinarily grant a prevailing beneficiary in an ERISA action reasonable attorneys' fees and costs, absent special circumstances cautioning against it."). This is because ERISA "is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans" and, specifically, "to afford them effective access to federal courts." *Smith*, 746 F.2d at 589.

Plaintiff is the prevailing party. He should thus "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Smith*, 746 F.2d at 589. In some cases, courts also note that the decision whether to grant attorneys' fees and costs is guided by the consideration of several factors set forth by the Ninth Circuit in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). Courts have consistently construed the *Hummell* factors in favor of participants in employee benefit plans. *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999) ("When we apply the *Hummell* factors, we must keep at the forefront ERISA's remedial

purposes that 'should be liberally construed in favor of protecting participants in employee benefit plans'").

There are no special circumstances that should prevent Plaintiff from recovering attorneys' fees. And even if the *Hummell* factors are applied, each of the *Hummell* factors support awarding Plaintiff his attorneys' fees and costs. The first *Hummell* factor, the "degree of opposing parties' culpability . . ." supports a fee award. This is true even if the Court finds that Defendants were not "culpable" or acting in bad faith in abusing their discretion because Defendants' failure to fulfill their legal duty to Plaintiff as his fiduciary warrants an award of fees. *See, e.g., King v. Cigna Corp.*, 2007 WL 4365504, at *2 (N.D. Cal. Dec. 13, 2007) ("[F]rom a legal perspective, Defendants are 'culpable' in that they were found to owe Plaintiff a legal duty that they were not fulfilling"); *Caplan v. CNA Financial Corp.*, 573 F. Supp. 2d 1244, 1248 (N.D. Cal. 2008) (same). Thus, the first *Hummell* factor supports a fee award. This Court found that the Retirement Board gave "no indication that it discussed or considered any of the medical reports Dimry submitted," and that "no explanation is given for the Board's apparent decision to disregard the findings and opinions of Dimry's treatment providers." Dkt. No. 80 at 3. The Court further characterized the Retirement Board's conduct as "questionable." *Id.* at 7.

By completely abandoning their discretion and failing to provide any explanations for their findings, Defendants breached their fiduciary duty to Plaintiff to adhere to "higher than marketplace quality standards on insurers" and "discharge [their] duties . . . solely in the interests" of Plaintiff. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008) (citing 29 U.S.C. §1104(a)(1)). Defendants failed to fulfill their legal duty to Plaintiff in this case for the reasons set forth in the Court's March 12, 2018 Order, and thus the first *Hummell* factor should be held in Plaintiff's favor.

The second *Hummell* factor—whether Defendant has the ability to satisfy a fee award—is plainly satisfied. The Bert Bell/Pete Rozelle NFL Player Retirement Plan files publicly available 500-series forms in compliance with annual employee benefit plan reporting requirements under ERISA and the Internal Revenue Code. For the twelve months ended March 31, 2017, the Plan reported assets of $2,320,683,344 billion. Quirk Decl., Exh. D (p. 3 of Independent Auditor's Report); Exh. E (p. 2 of Schedule H (Form 5500) 2016). The Plan's investment additions for 2017 totaled $429,803,133 million. Quirk Decl., Exh. D (p. 4 of Independent Auditor's Report). "Based on this

factor alone, absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorneys' fees from the defendant." *Smith*, 746 F.2d at 590. Defendants' ability to pay weighs heavily in favor of a fee award.

The third factor—the degree to which an award will deter future conduct—also favors Plaintiff. Despite Defendants' refusal to act as an ERISA fiduciary by properly considering Plaintiff's evidence of disability, ERISA does not authorize an award of compensatory or punitive damages for bad faith behavior. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (holding compensatory and punitive damages not available remedies for ERISA benefit claims). As a result, courts acknowledge that an award of attorneys' fees and costs is a way of deterring violations of ERISA. *Caplan*, 573 F. Supp. 2d at 1248 (an "award of attorneys' fees could serve to deter other plan administrators from denying meritorious disability claims" which "could indirectly benefit other individuals"); *see Carpenters Southern Californian Admin. Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984) (an attorneys' fees award to a prevailing plaintiff provides "added incentive to comply with ERISA"). Here, an award of attorneys' fees and litigation expenses will encourage Defendants and other ERISA fiduciaries to not commit "abandonment of discretion." Dkt. No. 80 at 7. As a result, the deterrence factor supports Plaintiff's application for attorneys' fees.

Similarly, the fourth factor—whether relief sought will benefit other participants or resolve a significant legal question regarding ERISA—favors Plaintiff, as the outcome of this lawsuit could have a deterrent effect on Defendants and other ERISA fiduciaries' illegal claims handling, which will ultimately benefit other claimants. *See Caplan*, 573 F. Supp. 2d at 1248 (holding that an award of attorneys' fees could serve to deter other plan administrators from denying meritorious disability claims); *Smith*, 746 F.2d at 590 (noting that such clarifications are "helpful to the trustees in future administration, but often 'depend on a plaintiff's initiative in bringing suit.'"). The Court's March 12, 2018 Order will benefit other Ninth Circuit ERISA beneficiaries in similar scenarios where a fiduciary tries to "decide a benefits claim by mere default to a Plan-selected physician." *Cf. Oster v. Guardian Life Ins.*, 768 F. Supp. 2d 1026, 1034 (N.D. Cal. 2011) (finding that the decision would benefit other ERISA beneficiaries in cases where there was a contradiction between the raw data of a neuropsychological evaluation and the conclusions made by an insurer's neuropsychologist).

Moreover, the Court's March 12, 2018 Order will benefit ERISA beneficiaries in other disability benefit cases where a claim administrator tries to deny a structural conflict of interest where its preferred physicians are paid large sums of money to render medical opinions. *See* Dkt. No. 80 at 5.

Finally, the fifth factor—the relative merits of the parties' positions—favors a fee award. *See Smith,* 746 F.2d at 590 (holding that a participant who obtained benefits through settlement was entitled to attorneys' fees). A fee award based on this factor does not require the plaintiff to prevail on every issue in litigation. Instead, an attorney fee award is appropriate under ERISA if a plan participant "succeeds on *any significant issue* in litigation which achieves *some of the benefit sought* in bringing suit and if no special circumstances make an award unjust." *McClure v. Life Ins. Co. of N. Amer.*, 84 F.3d 1129, 1136 (9th Cir. 1996) (internal quotation omitted) (emphasis added); *see also White v. Jacobs Engineering Group Long Term Disability Benefit Plan*, 896 F.2d 344, 352 (9th Cir. 1989) ("Plaintiffs in ERISA litigation who prevail on significant issues are generally entitled to reasonable attorney fees . . . particularly . . . where, as here, the opposing party is well situated to satisfy an award of fees.") (citation omitted).

This Court's fee award in *Caplan* is instructive. The court in that case held that the fifth *Hummell* factor supported an award of plaintiff's attorneys' fees even where one of the plaintiff's claims was denied. The *Caplan* Court so held because the plaintiff in that case had "succeeded on his *claim for benefits* . . . [and] attorneys' fees should not necessarily be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit . . . . The result is what matters." *Caplan*, 573 F. Supp. 2d at 1248 (internal citation omitted) (emphasis added).

Just as in *Caplan*, this Court determined that Plaintiff carried his burden of proving that Defendants abused their discretion in denying disability benefits. *Compare id.* at 1251 *with* Dkt. No. 80 at 7. Plaintiff prevailed on his (a)(1)(B) claim under ERISA, and because the "result is what matters" in this ERISA case, the fifth *Hummell* factor favors Plaintiff.

All the *Hummell* factors support an award of fees and costs for the litigation. Defendant cannot point to any circumstance that would somehow render an award of fees to Plaintiff unjust. In fact, it would be unjust and contrary to the purposes of ERISA to deny Plaintiff an award of fees and costs, where Defendant has refused to honor its contract under ERISA for over three years. If

reasonable fees and costs are not granted to Plaintiff in this action, insurers like Defendant, knowing that other claimants could go through a lengthy internal appeal process and litigation without adequate compensation, will be emboldened to act in bad faith against other similarly situated claimants.

IV. THE REQUESTED FEES AND COSTS ARE REASONABLE

A. A Lodestar Analysis Is The Proper Method For Measuring The Amount of Fees and Costs That Are Payable To Plaintiff

Under ERISA, attorneys' fees to a prevailing plaintiff are determined by a lodestar analysis, multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1383 (9th Cir. 1990). As shown below, the hours expended by Plaintiff's attorneys in this litigation were reasonable, and the requested rates are the prevailing rates in the community for attorneys with their experience and qualifications.

B. The Rates Charged By Plaintiff's Counsel Are Reasonable

The "reasonable hourly rate" is calculated "according to the prevailing market rates in the relevant community . . . ." *Blum v. Stenson*, 465 U.S. 886, 896-96 (1984). "Affidavits of the plaintiff['s] attorney and other attorneys regarding prevailing fees in the community . . . are satisfactory evidence of the prevailing market rate." *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). In the absence of opposing evidence, the proposed rates are presumed reasonable. *Id*.

Plaintiff seeks the following hourly rates: $900 for name-partner Terrence J. Coleman, $450 for associate Michael J. Quirk, and $225 for two experienced paralegals. The experience, skill, and reputation of Plaintiff's counsel support these rates. Plaintiff's counsel's firm is recognized as one of the leading plaintiff's ERISA litigation firms in the San Francisco Bay Area. Feinberg Decl., ¶10; Harris Decl., ¶9. Terrence J. Coleman has been recognized as an "ERISA expert" by the Northern District of California, is a frequent speaker and writer on ERISA and insurance litigation issues, and has significant trial and litigation experience. Coleman Decl., ¶¶7-8, 15, Exh. C. Michael J. Quirk, the senior associate attorney on this case and a former federal law clerk, also has considerable experience and success in the area of ERISA litigation. Quirk Decl., ¶¶4-5.

Given the rates charged by attorneys who practice in this area, Plaintiff's rates are clearly reasonable. Plaintiff submits with the instant motion declarations from ERISA specialists in the San Francisco Bay Area. One local specialist, Daniel Feinberg, currently charges an hourly rate of $800. Feinberg Decl., ¶7. Another specialist, Lee Harris, currently charges an hourly rate of $750 but acknowledges that this rate is below market for firms that specialize in insurance and ERISA in the San Francisco Bay Area. Harris Decl., ¶6. The declarations of these ERISA specialists confirm that Mr. Coleman's $900 hourly rate is within the appropriate range for ERISA litigation specialists in the San Francisco Bay Area. Statements from these specialists confirm that Mr. Coleman's rate is proper and consistent with the prevailing rates for ERISA litigation. As a result, Mr. Coleman's hourly rate is presumed reasonable, and there is no basis for departing from it. *See also Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947-48 (9th Cir. 2007) (once the party seeking fees has established that the rate sought is "in line with prevailing community rates," that rate is presumed reasonable).

Mr. Quirk's requested rate of $450 per hour is similarly reasonable, given the hourly rates awarded to attorneys with his level of experience. *See Caplan*, 573 F. Supp. 2d at 1249.; *Kresich v. Metro. Life Ins. Co.*, No. 15-cv-05801-MEJ, 2017 U.S. Dist. LEXIS 49713, at *4 (N.D. Cal. Mar. 31, 2017) ("rate of just under $400" reasonable for ERISA attorney with three years experience).

Moreover, several years ago the Northern District upheld the older hourly rates of $600 for Mr. Coleman and $400 for another Pillsbury & Coleman associate in a 2011 order granting attorneys' fees in an ERISA benefits case. Coleman Decl., ¶16, Exh. D; *Oster v. Guardian Life Ins.*, 768 F. Supp. 2d 1026, 1035-36 (N.D. Cal. 2011). The requested rates here, sought seven years after the *Oster* fee decision, are reasonable in light of the current market rate for ERISA litigation attorneys in the San Francisco Bay Area and nationally for attorneys with the experience of Mr. Coleman and Mr. Quirk. *See* Feinberg Decl., ¶¶7, 10-11; Harris Decl., ¶6, 9. In short, the evidence establishes that the hourly rates charged by Pillsbury & Coleman, LLP are reasonable and proper and consistent with the prevailing market rate. *See Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL 4415919, at *6 (W.D. Wis. Sept. 5, 2014), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016) (awarding fees from $395 for lower-level associates to $895 for partners).

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C. The Hours Expended Were Reasonable And Necessary To The Successful Prosecution Of The Case

In *Hensley*, *supra*, the Supreme Court held that in determining the reasonable time expended for calculation of statutory fees to prevailing plaintiffs, courts should normally award a fully compensatory fee encompassing all hours expended on the litigation. The Court stated:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

461 U.S. at 435.

Here, Plaintiff's counsel undoubtedly obtained excellent results by successfully presenting evidence of Defendants' abuse of discretion and obtaining a remand of his claim to the Retirement Board, and the hours expended by Plaintiff's counsel over two years of litigation to obtain those results are eminently reasonable. The case was not overstaffed, and the majority of the work in the case was performed by an associate, with the remainder of attorney time being performed by the partner responsible for the case. *See* Coleman Decl., Exh. B.

Defendants' counsel contested Plaintiff's case at every stage of the litigation, which required vigorous prosecution of this case. At the outset, Defendants filed two motions to dismiss, each of which required Plaintiff's briefing and preparation for oral argument, and eventually amendment of the pleadings. Dkt. Nos. 21, 25-26, 38, 43. Plaintiff devoted substantial time to preparing this case for the settlement conference with Judge Beeler, and substantial time to briefing the merits of his case through his motion for judgment. Defendants attempted to strike Plaintiff's evidence and filed objections to his Request for Judicial Notice, which further complicated Plaintiff's presentation of his case. Dkt. Nos. 68, 72-73. The factual and legal issues in the case, which included elaborate specialized NFL benefit plans, multiple medical evaluations, and analysis of various medical documentation recording Plaintiff's various comorbid conditions stemming from his injuries in the NFL were complex and required thorough presentation. *See generally* Dkt. No. 63.

Given the obstacles placed by Defendants during the litigation and the complex issues presented in this case, the time spent by Plaintiff's counsel to successfully litigate this case was entirely reasonable. Courts have acknowledged that "[p]laintiffs in ERISA matters generally must spend a great amount of time preparing for conferences and other proceedings because ERISA cases tend to be factually intensive." *Mogck v. Unum Life Ins. Co. of Amer.*, 289 F. Supp. 2d 1181, 1192 (S.D. Cal. 2003) (approving an award of $295,774.99 for ERISA claim when claim settled before trial). Like *Mogck*, this case was factually intensive; but unlike *Mogck*, this case was tried on the record. The fact-intensive nature and the legal complexities of ERISA litigation have been confirmed by plaintiff's attorneys who specialize in ERISA litigation. Harris Decl., ¶6; *Oster*, 768 F. Supp. 2d at 1036.

Moreover, courts routinely acknowledge that plaintiffs in ERISA and civil rights cases have no incentive to litigate cases inefficiently. *See Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) ("It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee . . . . By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker."); *Arnett v. Liberty Life and Acc. Ins. Co.*, 558 F. Supp. 2d 975, 982 (C.D. Cal. 2007) ("Defendants' numerous detailed objections to almost every hour accounted for by plaintiff's attorneys further supports plaintiff's request for fees related to the motion for attorneys' fees. To the extent that any of this time could be seen as excessive, these excesses were invited by the defendants' litigation strategy and will not be deducted.").

Exhibit B to Mr. Coleman's Declaration are the firm's detailed billing statements. Exhibit B reflects the fees and costs incurred in connection with the litigation of this case. Coleman Decl., ¶11. Each entry shows the dates that services were performed, the identity of the attorney or paralegal performing the service, the task or series of tasks completed, and the time spent. Each entry was contemporaneously inputted into the firm's computerized billing system and shows the actual work performed in this case from the time Plaintiff began evaluating his basis for filing his complaint to April 9, 2018, the most recent date for which fee statements are available. Fees and costs incurred

since April 10, 2018—including additional fees to prepare this Motion, prepare the reply papers and argue the Motion—will be submitted in a supplemental declaration with the reply papers. What are not included in the billing statement are the fees that Plaintiff's counsel, exercising billing judgment, has reduced because he felt such hours were duplicative or inefficient. Coleman Decl., ¶13.

Plaintiff anticipates that Defendants will argue that the compensable fees and costs exceed Plaintiff's relief in this action. This argument is misguided on several counts. First, the Supreme Court and the Ninth Circuit have rejected the notion that attorneys' fees in civil rights cases should be proportional to the relief granted to a plaintiff. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986) (upholding attorneys' fees award of $245,456.25 where compensatory and punitive damages were $13,300 from federal claims and $20,050 from state-law claims); *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988) ("the district court should not have reduced the attorneys' fees simply because the damage award was small"); *Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir. 1996) (vacating district court's fee award of $20,000 in case where the plaintiff won $17,500 in compensatory damages, stating that plaintiff's counsel included "extensive and detailed explanations as to why the lodestar figure of $134,759.75 was a reasonable fee in this case.").

Likewise, "in ERISA cases, there is no requirement that the amount of an award of attorneys' fees be proportional to the amount of the underlying award of damages." *Building Services Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway,* 46 F.3d 1392, 1401 (6th Cir. 1995). In *Building Services* the court upheld an attorneys' fees award that was almost three times the underlying judgment. The court relied on *Operating Engineers Pension Trusts v. B & E Backhoe, Inc*., 911 F.2d 1347, 1355-56 (9th Cir. 1990), in which the Ninth Circuit rejected a request to establish a "*de minimus*" rule with respect to attorneys' fees awards.

Courts in many other cases have rejected any attempts to peg attorney's fee recoveries to the amount of benefits recovered in ERISA cases, or even any recovery at all. *See, e.g.*, *Hegarty v. AT & T Umbrella Benefit Plan No. 1*, 109 F. Supp. 3d 1250, 1258 (N.D. Cal. 2015) (court remanded the benefit "claim to the administrator for further proceedings" and also found that "an award of reasonable attorney's fees and costs appropriate" when court orders remand); *Peterson v. Federal Express Corporation Long Term Disability Plan*, 525 F. Supp. 2d 1125 (D. Ariz. 2007) (award of

$123,000 in attorneys' fees for recovery of $40,000); *Mizzell v. Provident*, 32 Fed. Appx. 352, 2002 WL 461715 (9th Cir. Mar. 18, 2002) (upholding award of attorneys' fees even though the district court remanded the case to Provident without granting benefits); *Parke v. First Reliance Standard Life Ins.*, 2003 U.S. Dist. LEXIS 825 (D. Minn. Jan. 8, 2003) (awarding $96,448 in attorneys' fees and $1,680.94 in costs after awarding the claimant $687 in interest earned on unpaid benefits).

The court in *Peterson* recognized the need to reasonably compensate counsel for successfully litigating ERISA benefits cases, no matter what the size of the benefits:

> That ERISA benefits are often modest in comparison to the complexity and expense of litigating wrongfully rejected claims *weighs in favor of, not against, awards of the full value of services reasonably expended*. To do otherwise would deter the prosecution of meritorious claims and signal to those who are wrongly denied disability benefits that they will lose even if they win their case.

Peterson, 525 F. Supp. 2d at 1128 (emphasis added). The need to compensate plaintiffs' attorneys in successful ERISA benefit cases without regard to the amount of the benefits won is especially clear here. If a fully compensatory fee is not awarded in this situation, it would be akin to rewarding Defendant for treating Plaintiff like an adversary during the claims process. Insurers like Defendant and its counsel would have an incentive to make the ERISA pre-litigation claims process and litigation as arduous and time-consuming as possible, knowing that their liability for attorneys' fees is tied to the amount of the underlying claim. It is difficult enough for individual insureds to combat improper claim denials and find competent counsel. Tying attorney's fee awards in any way to the amount-in-controversy or a specific monetary award of benefits would only exacerbate this problem, and courts have properly rejected this position.

Because Plaintiff was successful in this action, and because all the *Hummell* factors weigh in Plaintiff's favor, Plaintiff is entitled to an award **$279,370.00** attorneys' fees as set forth in Exhibit B of the Coleman Declaration, plus additional fees incurred from April 10, 2018 to the hearing date for this Motion to be set forth in a supplemental declaration. Coleman Decl., ¶13, Exh. B (pp. 1-22 of billing statement showing hours billed by timekeeper and fee amounts).

D. The Litigation Expenses Requested Are Reasonable

The Ninth Circuit has held a court can award reasonable litigation out-of-pocket expenses (including computer-based legal research costs) that would normally be charged to a fee paying client,

as part of "reasonable attorneys' fees" under ERISA section 502 (g)(2)(D), 29 U.S.C. §1132(g)(2)(D). *Trustees of the Construction Industry and Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1259 (9th Cir. 2006). Relying on *Trustees*, the Central District has awarded "expenses as part of attorneys' fees even if not the kind of expenses normally covered by 28 U.S.C. § 1920" to a prevailing plan participant. *Mitchell v. Metropolitan Life Ins. Co.*, 2008 WL 1749473 at *5 (C.D. Cal. Apr. 7, 2008) (awarding expenses not covered by 28 U.S.C. §1920). And more recently, the Northern District in the *Oster* matter awarded Plaintiff's counsel all of its claimed litigation expenses. Coleman Decl., Exh. D; *Oster*, 768 F. Supp. 2d at 1038.

Plaintiff seeks an award of litigation expenses in the amount of **$2,635.62** pursuant to 29 U.S.C. § 1132(g). Coleman Decl., Exh. B (pp. 22-23 of fee statement). As reflected in the billing statements attached as **Exhibit B** to Mr. Coleman's Declaration, that amount is the actual out-of-pocket expenses Plaintiff incurred in order to overturn Defendants' wrongful denial of benefits. The underlying purposes of ERISA—to protect the interests of employees in welfare benefit plans and to assure access to courts—can only be promoted through a full award of expenses incurred in this case. A supplemental billing statement reflecting out-of-pocket expenses incurred from April 10, 2018 through the hearing date will be provided with a supplemental declaration to be filed with the reply papers for this Motion. Coleman Decl., ¶13.

V. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant his Motion for Attorneys' fees and award him (1) **$279,370.00** in attorneys' fees and **$2,635.62** in litigation expenses, (2) fees and costs incurred from April 10, 2018 to the hearing date for this Motion (the evidence of which will be supplemented in Mr. Dimry's reply papers), and (3) post-judgment interest.

Dated: April 10, 2018

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